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APPELLANT, PRO SE:

**DYLAN MORGAN**

Wabash Valley Correctional Facility  
Carlisle, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DYLAN MORGAN,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 49A02-0609-CR-800

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Tanya Walton Pratt, Judge  
Cause No. 49G01-9804-CF-51466

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**December 20, 2006**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Dylan Morgan (Morgan), appeals the trial court's Order denying his Motion to Compel Attorney to Deliver Over Money.

We reverse and remand.

## ISSUE

Morgan raises one issue on appeal, which we restate as: Whether the trial court properly denied Morgan's Motion to Compel Attorney to Deliver Over Money.

## FACTS AND PROCEDURAL HISTORY

On October 28, 1998, Morgan was convicted of aggravated battery, a Class B felony, and voluntary manslaughter, a Class A felony, both as lesser included offenses of murder. As a result, he was sentenced on January 15, 1999, to serve 40 years imprisonment. Morgan subsequently retained Attorney Henry Y. Dein (Dein) to seek Post-Conviction Relief on his behalf; Morgan paid Dein a \$5,000.00 retainer fee.

On June 29, 2006, Morgan wrote Dein a letter requesting that all or a portion of the \$5,000.00 be returned to him within 30 days. Dein failed to respond to Morgan's correspondence and on August 3, 2006, Morgan filed his Motion to Compel Attorney to Deliver Over Money, pursuant to I.C. §33-43-1-9. On August 8, 2006, the trial court summarily denied Morgan's motion stating, "Denied. The trial court has no jurisdiction over an attorney fee dispute." (App. p. 21).

Morgan now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

Morgan contends that the trial court erroneously denied his motion to compel counsel to deliver over the unearned portion of the retainer fee. We agree.

Under I.C. § 33-43-1-9:

If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them in the course of the attorney's professional employment the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if an action was not prosecuted, by the order of *any court of record*, to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

(emphasis added). This statute shows that any court has jurisdiction to hear a motion for contempt when an attorney has refused to deliver over money or papers. Both this statute and the Ind. Professional Rules of Conduct provide relief to a defendant when an attorney fails to deliver either documents or money. *See* Prof. Cond. R. 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as...*refunding any advance payment of fee* that has not been earned.") (emphasis added); *see also Ferguson v. State*, 773 N.E.2d 877, 880 (Ind. Ct. App. 2002). Therefore, we conclude the trial court lacked discretion to deny Morgan's request for the unearned portion of the retainer fee without at least first holding a hearing.

As we stated in *Ferguson*, upon remand a hearing will be necessary. *Id.* at 881. Our supreme court has stated that when a motion to compel delivery of money or papers is presented, the trial court should provide reasonable notice to the attorney, hold a

hearing on the matter, and then rule on the motion. *Id.*; see *Smith v. State*, 426 N.E.2d 402, 404 (Ind. 1981). Here, a hearing would assist the trial court in determining to what portion of the retainer fee, if any, the defendant is entitled. *Id.* It appears that Morgan believes he is entitled to the entire \$5,000.00. However, neither Morgan nor the trial court has received any response from Dein; therefore, Dein's position has not yet been made known in this matter. Dein failed to respond to Morgan's letter of June 29, 2006, he did not file a reply to Morgan's Motion to Compel Attorney to Deliver Over Money dated August 3, 2006, and he did not file a brief in this appeal. A hearing would require Dein to come forward and show cause why the retainer fee should not be returned to Morgan. Such matters should be determined on remand.

### CONCLUSION

Based on the foregoing, we find the trial court erroneously denied Morgan's Motion to Compel Counsel to Deliver Over Money, pursuant to I.C. § 33-43-1-9. Therefore, this cause is reversed and remanded, and a hearing will be necessary to determine the necessity of delivering the amount of unearned fees, if any.

Reversed and remanded for proceedings consistent with this opinion.

KIRSCH, C.J., and FRIEDLANDER, J., concur.

